IN THE SUPREME COURT OF THE UNITED STATES
No. 105, Original
October Term 1985

STATE OF KANSAS,

Plaintiff,

v. (Filed Nov. 27, 1989)

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

COLORADO'S ANSWER TO THE FIRST AMENDED COMPLAINT AND COUNTERCLAIM

ANSWER

Defendant, the State of Colorado, for its answer to the First Amended Complaint filed in the above-captioned action by Plaintiff, the State of Kansas, states:

1. Colorado admits the Court has jurisdiction under the allegations in paragraph 1 of the First Amended Complaint. Colorado denies that this is an appropriate case for the Court to exercise such jurisdiction because Kansas has failed to exhaust its administrative remedies under Article VIII of the Arkansas River Compact.

2. Colorado admits the allegations in paragraph 2 of the First Amended Complaint.

3. Colorado admits the allegations in paragraph 3 of the First Amended Complaint.

4. Colorado admits that one of two major purposes of the Arkansas River Compact is quoted in paragraph 4 of the First Amended Complaint. Colorado denies the allegations of paragraph 4 insofar as they assert that the purpose set forth in Article I-B of the Compact is the "principal" purpose of the Arkansas River Compact.

5. Colorado admits that a portion of Article IV-D of the Compact is quoted in paragraph 5 of the First Amended Complaint. Colorado denies the allegations of paragraph 5 insofar as they assert Kansas' interpretation of Article IV-D.

6. Colorado admits that a portion of the first sentence of Article V-F of the Arkansas River Compact is quoted in paragraph 6 of the First Amended Complaint. The first sentence of Article V-F in its entirety reads as follows:

> In the event the Administration finds that within a period of fourteen (14) days the water in the conservation pool will be or is liable to be exhausted, the Administration shall forthwith notify the State Engineer of Colorado, or his duly authorized representative, that commencing upon a day certain within said fourteen (14) day period, unless a change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which

their respective priority rights were administered by Colorado before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed.

Colorado affirmatively alleges that the Arkansas River Compact Administration by resolution in 1980 adopted an operating plan for John Martin Reservoir which modifies the method by which the Administration finds that the water in the conservation pool is exhausted for the purposes of Article V-F.

7. Colorado denies the allegations in paragraph 7 of the First Amended Complaint.

8. Colorado denies the allegations in paragraph 8 of the First Amended Complaint.

9. Colorado denies the allegations in paragraph 9 of the First Amended Complaint.

10. Colorado admits that for more than twenty years its agencies or officials have investigated ground water appropriations in the Arkansas River Basin in Colorado. Colorado denies the remaining allegations of paragraph 10 of the First Amended Complaint.

11. Colorado denies the allegations in paragraph 11 of the First Amended Complaint.

12. Colorado admits that the Arkansas River Compact Administration was in the process of conducting an investigation of alleged Compact violations pursuant to Article VIII-H of the Arkansas River Compact at the time Kansas commenced this proceeding on December 16, 1985, and that Colorado refused to enjoin all post-compact ground water appropriations in Colorado during the

pendency of the investigation. Colorado admits that the Colorado representatives to the Arkansas River Compact Administration rejected requests by the Kansas representatives to investigate the consequences of possible future increases in the consumption of Colorado's "transmountain" return flows. Colorado denies the remaining allegations of paragraph 12 of the First Amended Complaint.

13. Colorado denies the allegations in paragraph 13 of the First Amended Complaint.

14. Colorado denies the allegations in paragraph 14 of the First Amended Complaint.

15. Colorado denies the allegations in paragraph 15 of the First Amended Complaint.

16. Colorado denies the allegations in paragraph 16 of the First Amended Complaint.

17. Colorado denies the allegations in paragraph 17 of the First Amended Complaint.

AFFIRMATIVE DEFENSES

1. Kansas failed to exhaust its administrative remedies under Article VIII of the Arkansas River Compact.

2. Kansas' claims against Colorado are barred by accord and satisfaction, failure to mitigate damages, laches, estoppel, waiver, statute of limitations, or the doctrine of unclean hands.

3. To the extent post-compact developments were beyond the control of the State of Colorado, Colorado is not liable for those acts.

4. Article V-E(5) of the Arkansas River Compact provides there shall be no allowance or accumulation of credits or debits for or against either state.

5. With regard to Kansas' claim that Colorado and its water users have materially depleted the usable and available stateline flows of the Arkansas River since the adoption of the Compact to the injury of water users in Kansas under the Compact, Colorado asserts that irrigation in the Arkansas River basin in Colorado has declined since the adoption of the Compact and that acreage under irrigation in western Kansas has increased at least fivefold in the same period, from approximately 65,000 acres in 1948 to 350,000 acres in 1980. Kansas seeks to have this Court rewrite the Arkansas River Compact to impose a new stateline delivery obligation on Colorado so as to maintain a post-compact well economy in western Kansas, all at the expense of Colorado water users, contrary to the express terms of the Compact.

6. Waters brought into the Arkansas River basin from other river basins are not apportioned to Kansas under the Arkansas River Compact and Kansas has no claim or right to such waters.

7. In 1980, the Arkansas River Compact Administration approved an operating plan for John Martin Reservoir pursuant to which water stored in the conservation pool of the reservoir is transferred into separate storage accounts for Kansas and ditches in Colorado Water District 67 at agreed upon rates and is apportioned into the accounts in agreed upon percentages. Based upon a series of agreements among Colorado users, after water stored

in the conservation pool is fully transferred to the separate storage accounts, but not necessarily released from the reservoir, Colorado reverts to administration of decreed priorities and the decreed rights of water users in Colorado Water District 67 are administered as against rights decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner as though John Martin Dam had not been constructed. The Colorado representatives approved the operating plan in 1980 and have allowed the operating plan to remain in effect from year-to-year thereafter, to the substantial benefit of Kansas water users, based upon the aforesaid agreements among Colorado water users to determine when a "call" by ditches in Colorado Water District 67 will be enforced above John Martin Reservoir. Those agreements were in turn based on an agreement to permit storage of historical direct-flow winter diversions upstream from John Martin Reservoir. Kansas has accepted the benefits of the 1980 operating plan and agreed to its terms with knowledge of the agreements among Colorado water users and with knowledge that the 1980 operating plan would change the regimen of the Arkansas River. Therefore, by having accepted the benefits of the 1980 operating plan, Kansas is barred from asserting that any reregulation of the native waters of the Arkansas River be approved by the Compact Administration based upon the Administration's Resolution of July 24, 1951.

8. With regard to Kansas' allegation that Colorado, through its Compact "Commissioner", has rejected and

continues to reject Kansas' requests to investigate Colorado's "unilateral rejection" of the Arkansas River Compact Administration's Resolution of July 24, 1951, Colorado denies that the Resolution has any binding effect on Colorado. In the alternative, the Resolution was amended by the Administration on January 4, 1982. Further, Kansas failed to raise an objection to the winter storage program in Pueblo Reservoir for six years after it began operation in 1975 with the full knowledge of Kansas and the Administration.

COUNTERCLAIM

Defendant, the State of Colorado, by its Attorney General, asserts the following counterclaim against Plaintiff, the State of Kansas:

1. The Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2 of the Constitution of the United States, and Paragraph (a), Subsection (1), Section 1251, Title 28 of the United States Code.

2. The Arkansas River is an interstate stream which rises in the Rocky Mountains near Leadville, Colorado, then flows southeasterly to Salida, Colorado, then east through Canon City to Pueblo, Colorado, then across the plains of eastern Colorado into the State of Kansas.

3. In order to settle existing disputes and to remove causes of future controversy concerning the waters of the Arkansas River and to equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River, as well as the benefits arising from the construction, operation, and maintenance of John Martin Reservoir for water conservation purposes, the States of

Colorado and Kansas ratified the Arkansas River Compact, which Compact was approved by the United States Congress by Act of May 31, 1949, 63 Stat. 145.

4. Article V-E(2) of the Arkansas River Compact provides: "Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream [from John Martin Reservoir] is authorized by the [Arkansas River Compact] Administration."

5. On information and belief, the state officials charged with administration of water rights in Kansas have allowed water released from John Martin Reservoir upon demand by Kansas under Article V of the Arkansas River Compact to be stored downstream in Lake McKinney in Kansas rather than being applied promptly to beneficial use, in violation of the provisions of Article V-E(2) of the Compact.

6. Subsequent to the approval of the Arkansas River Compact by the United States Congress in 1949, state officials charged with the administration of water rights in Kansas have allowed the construction of wells and have permitted ground water appropriations in Kansas that have materially depleted the usable quantity or availability for use to the surface water users in Kansas under the Compact. Those depletions caused Kansas to make additional demands for releases of water stored in John Martin Reservoir pursuant to the Compact to the detriment of water users in Colorado.

7. Irreparable injury to the State of Colorado and water users in Colorado under the Compact has been caused by the acts and conduct of the State of Kansas, its officers, and citizens in permitting the use of the waters

of the Arkansas River in violation of the terms of the Compact.

WHEREFORE, having fully answered and having asserted its affirmative defenses and counterclaim, Colorado prays that the Court grant judgment for Colorado and against Kansas on the claims of Kansas, that the Court issue its decree compelling the State of Kansas, its officers, and citizens to comply with the provisions of the Arkansas River Compact, that Colorado have and recover its reasonable costs, and for such other and further relief as the Court may deem proper under the circumstances.

DUANE WOODARD
Attorney General of Colorado

CHARLES B. HOWE
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

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/s/ David W. Robbins
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Attorneys for Defendant
State of Colorado

CERTIFICATE OF SERVICE

I, David W. Robbins, hereby certify that I am a member of the Bar of this Court and Counsel of Record for the State of Colorado and that on the 22nd day of November, 1989, I caused a true and correct copy of Colorado's Answer and Counterclaim to Kansas' First Amended Complaint to be placed in the United States mail, first class postage prepaid, addressed as follows:

The Honorable Arthur L. Littleworth
(original and one copy)
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APPENDIX – Exhibit 4

Answer of the United States to the First Amended Complaint, filed January 15, 1990

No. 105 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

BEFORE THE HONORABLE
ARTHUR L. LITTLEWORTH,
SPECIAL MASTER

STATE OF KANSAS, PLAINTIFF

v.

STATE OF COLORADO, ET AL.

ANSWER OF THE UNITED STATES TO THE FIRST AMENDED COMPLAINT

(Filed Jan. 15, 1990)

KENNETH W. STARR
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

BEFORE THE HONORABLE
ARTHUR L. LITTLEWORTH,
SPECIAL MASTER

No. 105 Original
STATE OF KANSAS, PLAINTIFF
v.
STATE OF COLORADO, ET AL.

ANSWER OF THE UNITED STATES TO THE FIRST AMENDED COMPLAINT

The United States, in response to the First Amended Complaint of the State of Kansas, states:

1. The averments of paragraph 1 are conclusions of law to which no response is required.

2-3. The averments of paragraphs 2 and 3 are admitted.

4. The United States admits that one of the purposes of the Arkansas River Compact is as quoted in paragraph 4 of the complaint, and avers that the Compact itself is the best evidence of its contents. Act of May 31, 1949, 63

Stat. 145. The remaining averment of paragraph 4 is a conclusion of law to which no response is required.

5. The United States admits that the portion of Art. IV(D) of the Arkansas River Compact is as quoted in paragraph 5 of the complaint and avers that the Compact itself is the best evidence of its contents. The remaining averments of paragraph 5 are conclusions of law to which no response is required.

6. The United States admits that the portion of Article V(F) of the Arkansas River Compact is as quoted in paragraph 6 of the complaint and avers that the Compact itself is the best evidence of its contents. The United States avers that the Arkansas River Compact Administration by resolution in 1980 adopted an operating plan for John Martin Reservoir which modifies the method by which the Administration finds that the water in the conservation pool is exhausted for the purposes of Article V(F) of the Compact.

7-11. The United States is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7-11 of the complaint.

12. The United States admits the averments of the first sentence of paragraph 12 and that the State of Colorado, through its Compact Commissioner, has at various times declined to approve investigations of the impact on the Arkansas River of certain of the matters itemized in paragraph 12. The United States is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 12.

13-17. The United States is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 13-17 of the complaint.

AFFIRMATIVE DEFENSES

1. The Trinidad Project is a multi-purpose project constructed and operated by the United States Army Corps of Engineers in accordance with federal laws and operating principles developed by the Bureau of Reclamation and approved by the States of Colorado and Kansas. Pursuant to a request by the Arkansas River Compact Administration, the United States Bureau of Reclamation has undertaken a review of the Trinidad Project operating principles and has issued a final report recommending certain modifications of the operating principles. Adoption of the Bureau of Reclamation's report by the Arkansas River Compact Administration and implementation of the recommendations contained in the report to insure that the waters of the Arkansas River shall not be materially depleted in usable quantity or availability for use by the water users in Colorado and Kansas will moot plaintiff's claims with respect to the Trinidad Project.

2. Pueblo Dam and Reservoir are features of the Fryingpan-Arkansas Project, a multipurpose project authorized by Congress in 1962 in "substantial accordance with the engineering plans" set forth in House Document 83-187. Act of August 16, 1962, 76 Stat. 389, as amended by Act of October 27, 1974, 88 Stat. 1486, 1497, and Act of November 3, 1978, 92 Stat. 2493. The engineering plans set forth in H.R. Doc. No. 83-187 include a winter storage program at Pueblo Reservoir. Accordingly,

with respect to any claim that the winter storage program at Pueblo Reservoir should have been submitted to the Arkansas River Compact Administration for approval, the complaint fails to state a claim upon which relief may be granted, for the winter storage program is a Congressionally authorized feature of the Fryingpan-Arkansas Project.

3. The winter storage program has been in place at Pueblo Reservoir since 1976, with the knowledge of the Arkansas River Compact Administration, and the repayment contract for the Project between the United States and the Southeastern Colorado Water Conservancy District contains specific provisions for the storage of winter water. Accordingly, plaintiff's claim that the winter storage program should have been submitted to the Arkansas River Compact Commission for approval is barred by the equitable doctrine of laches.

WHEREFORE, the United States respectfully prays that the Court issue an order protecting the rights of the United States in the Trinidad Project and the Fryingpan-Arkansas Project, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

PATRICIA L. WEISS
ANDREW F. WALCH
Attorneys

JANUARY 1990

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

STATE OF KANSAS Plaintiff, v. STATE OF COLORADO Defendant, vs. and UNITED STATES OF AMERICA Defendant-Intervenor	)	No. 105, Original

CERTIFICATE OF SERVICE
(Filed Jan. 15, 1990)

It is hereby certified that all parties required to be served have been served copies of the ANSWER OF THE UNITED STATES TO THE FIRST AMENDED COMPLAINT, by first-class mail, postage prepaid, this 12th day of January, 1990.

[SEE ATTACHED SERVICE LIST]

/s/ Kenneth W. Starr
KENNETH W. STARR
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The Honorable Arthur L. Littleworth
Special Master
United States Supreme Court
Best, Best & Krieger
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The Honorable Roy Romer
Governor of Colorado
State Capitol 136
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APPENDIX – Exhibit 5

Decision of Special Master on Colorado Motion to Stay, filed October 21, 1988

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petitioner, v. STATE OF COLORADO, Respondent.	)	No. 105, Original October Term, 1985

DECISION OF SPECIAL MASTER ON COLORADO MOTION TO STAY

(Filed Oct. 21, 1988)

Colorado filed a Motion to Stay Based on Kansas' Failure to Exhaust Its Administrative Remedies. The Motion dealt with two of the several issues in the Complaint: i.e., post-Compact well development in Colorado, and the operation of Trinidad Reservoir. The Motion was fully briefed, and oral argument was held in the Federal Court of Appeal in Pasadena, California on September 28, 1988. David W. Robbins, Esq. argued the Motion for Colorado, and Richard A. Simms responded for Kansas.

Kansas acknowledges that it has an obligation, before seeking judicial relief, to exhaust its administrative remedies under the Arkansas River Compact. The Compact was ratified by the respective legislatures of each state, and approved by Congress in 1949. (Act of May 31, 1949, 63 Stat. 145) The Compact Administration is similar to that discussed in *State of Texas vs. State of New Mexico* (1983) 462 U.S. 554, 77 L.Ed.2d 1; 103 S.Ct. 2558. The Administration consists of three representatives from each state, but each state ". . . shall have but one vote in

the Administration and every decision, authorization or other action shall require unanimous vote." (Article VIII-D) While a representative of the United States chairs the Administration, he has no vote. (Article VIII-C)

Only two specific remedies for alleged Compact violations are provided for in the Compact. It provides that violations shall be "promptly investigated" by the Administration, although the procedure for the investigation and any remedies still require agreement between the states. (Article VIII-H) In addition, disputes "may," by unanimous vote, be referred for arbitration. (Article VIII-D) Both parties agree that the exhaustion test under the circumstances involved here is whether a state has made a "reasonable effort" to proceed first through the Compact Administration. Colorado also acknowledges that it is proper to seek judicial relief if an investigation by the Administration reaches an impasse. (Colo. Br., p. 21) Colorado, as part of its Motion, filed four large volumes of Appendix documents, going back several years, which appear to include the Compact Administration record with respect to post-Compact well development and the operations of Trinidad Reservoir. Both parties relied upon this record in their briefs and arguments.

Kansas argues first that the exhaustion issue was actually decided by the United States Supreme Court when it authorized the filing of Kansas' Complaint. Kansas moved to file its Complaint on December 16, 1985, alleging that the State of Colorado and its water users had materially depleted the usable and available stateline flows of the Arkansas River in violation of the Compact.

Kansas further alleged that Colorado had blocked Kansas' efforts to have the Compact Administration investigate its complaints.

On February 18, 1986, Colorado filed a brief in opposition to Kansas' Motion for Leave to File Complaint. The thrust of that brief was that Kansas had not made a "reasonable effort" to resolve its complaints through the Compact Administration, and that absent such an effort, the Supreme Court should decline to hear the matter. (p. 1) Colorado stated that the question presented was whether Kansas had met its burden " . . . to demonstrate that a pending investigation of the Arkansas River Compact Administration is not an adequate means to vindicate its allegations of Compact violations." (p. 3) In its brief, citing certain documentary evidence, Colorado alleged that there was a "pending investigation" by the Compact Administration, that the Administration was not deadlocked or unable to act, and that Colorado had not refused to investigate Kansas' allegations. (pp. 8-9) However, Colorado did not file with the Supreme Court the same voluminous administrative record used to support its Motion before the Special Master.

In response to Colorado's brief, Kansas on March 3, 1986 filed a new motion in the alternative, either for leave to file its complaint, or to compel an investigation by the Compact Administration pursuant to Article VIII-H. In its supporting brief, Kansas outlined in further detail its view of efforts taken within the Compact Administration, and the alleged frustration of the administrative procedure. Thus, the question of whether the administrative process had been properly exhausted was clearly an issue in the pleadings before the Supreme Court.

The Supreme Court's Order stated simply:

"The motion for leave to file a bill of complaint is granted. Defendant is allowed sixty days within which to file an answer."

Kansas contends that the Court made a choice between the alternatives presented in its Motion, and thereby disposed of the exhaustion issue. Colorado, on the other hand, argues that the Court's silence is not a basis for inferring intent, and had the Court intended to decide the exhaustion issue, it would have ordered argument and decided the issue explicitly.

The requirement of a motion for leave to file a complaint and the requirement of a brief in opposition do enable the Supreme Court to dispose of matters at a preliminary stage. (*Ohio v. Kentucky* (1973) 410 U.S. 641, 644) As the Court has explicitly recognized, its objective in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presents. (*Id.*) To this end, the Court has strongly suggested that granting an original plaintiff's motion for leave to file complaint amounts to a rejection of arguments that the case should be dismissed. (*Maryland, et al. v. State of Louisiana* (1981) 451 U.S. 725, 740, fn. 16) Further, in the analogous case of *Texas v. New Mexico* (1983) 462 U.S. 554, the Court intimated that "fundamental structural considerations," such as an interstate compact that accords each signatory state the power to veto authoritative commission action, may abbreviate inquiry into the question of whether an available remedy exists at the administrative level. (462 U.S. 54, 568-570)

It is not necessary, however, to decide Colorado's present Motion on the basis of the Supreme Court order. The Special Master is convinced that Kansas did make a reasonable effort to pursue its complaints through the Compact Administration, but because of the inherent limitations in that procedure, the parties reached an impasse. Indeed, the briefs and oral argument on the Motion dealt primarily with the substance of the efforts before and by the Compact Administration, and not upon the Supreme Court order.

First, with respect to post-Compact well development, Kansas cites numerous law reviews and other secondary sources to show that unregulated well development, and its impact on surface water users, has been a problem for many years. (Kan. Br., pp. 30-31) By 1983 Kansas began its own study of the decline in flows of the Arkansas River, and the development of upstream wells in Colorado as a possible cause. Completed in 1984, that study concluded that for the period 1974 to 1981 a conservative estimate of the stateline depletions due to post-Compact wells in Colorado was 40,000 to 50,000 acre-feet per year. (Appendix Exh. 21, p. iii) Colorado and the Compact Administration were aware of that study. Nonetheless, Colorado contends that Kansas did not formally seek a Compact investigation of this issue until February of 1985. (Colo. Closing Br., pp. 21, 27) Assuming that to be true for purposes of this Motion, there is no question that on March 28, 1985 the Compact Administration directed a formal investigation of the depletion of stateline flows. A number of potential causes were to be investigated, including specifically "well development of the waters of the Arkansas River in Colorado," as well as

"the operation of the Trinidad Dam and Reservoir project." (Appendix Exh. 28, attached Exh. L)

The Compact Administration Resolution directed that the investigation be undertaken by a committee consisting of the Director of the Colorado Water Conservation Board and the Chief Engineer of Kansas, or their respective designees. Thus, the same unanimity requirements that limited the Administration itself were carried over into the structure of this investigation. Finally, the March 28 Resolution called for the investigation to be completed by the next annual meeting of the Compact Administration on December 10, 1985.

The engineers for the two states met promptly, but were unable initially to agree upon a scope of work for the investigation. (Appendix Exh. 29) At their next meeting they agreed to defer consideration of a complete scope of work, and defined instead a preliminary scope that included the compilation of certain data and construction of a series of mass diagrams. (Appendix Exh. 30, p. 2) The mass diagrams were presented at their meeting on July 12, 1985, but again the two engineers were unable to agree "about what the diagrams did or did not show." (Appendix Exh. 32, p. 4) Finally they decided to prepare and exchange separate reports analyzing the mass curves, and recommended that the Compact Administration hold a special meeting on October 8, 1985 to receive such report as the committee might be ready to make. (*Ibid.*) The committee met once again on September 17, ". . . but was unable to agree on the conclusions to be drawn from the single and double mass diagrams and on what further investigation, if any, should be undertaken." (Appendix

Exh. 34, pp. 4) J. William McDonald, the Colorado representative on the committee, reported to the Compact Administration that the committee had "reached an impasse" at its September 17 meeting. (Appendix Exh. 36, p. 2)

Against this background, the Compact Administration met on October 8, 1985. The Colorado representative acknowledged that there had been a "substantial decline in usable stateline flows starting in 1974." (Appendix Exh. 36, p. 4) However, he did not see post-Compact well development as the cause. He stated:

> "It seems to me that all the engineering shows thus far is that there has been a decline in usable stateline flows starting in 1974, which corresponds it appears to me, to a decline in tributary inflow rather than to well development or any other beneficial development in the Arkansas River basin in Colorado." (Appendix Exh. 37, p. 32)

Colorado therefore took the position that the investigation should first examine neither the well issue nor the operations of Trinidad Reservoir, but (1) reduced diversions by ditches in Colorado Water District 67; (2) the operating plan for John Martin Reservoir; (3) decreased plains precipitation; and (4) soil conservation measures. (Appendix Exh. 37, p. 35)

With respect to well development, the Colorado representative stated:

> "In that context I do not believe it is appropriate to launch an investigation of well pumping in Colorado as David (David Pope, Kansas State Engineer) has urged in his second report until

> we have determined whether the declines in usable stateline flows might be the result of other causes, which I believe to be more likely than the causes which David has addressed. . . . And it has been my position therefore that the investigation should indeed continue, but it should start first with those factors which at this point in time appear to be most likely explanations for the decline in usable stateline flows." (Appendix Exh. 37, pp. 31-32)

Kansas, on the other hand, urged that the investigation proceed to examine ten possible causes for the decline in stateline flows, including all those suggested by Colorado, and including well development and the operations of Trinidad Reservoir. (Appendix Exh. 37, pp. 35-36) The Compact Administration finally adopted a Resolution that the committee continue its investigation only of those matters mutually agreed upon, that is, the four items suggested by Colorado. (Appendix Exh. 37, pp. 37-38)

Colorado now argues that it did not "rule out" an investigation of the impact of post-Compact wells on stateline flows, but neither did it commit that Kansas' complaints would ever be investigated. (Colo. Closing Br., p. 28; Appendix Exh. 37, p. 33) The facts are that in March the Compact Administration directed an investigation of post-Compact well development and the operations of Trinidad Reservoir, as possible causes among others for the decline in stateline flows. The investigation was to have been completed within the year. Yet by October, at Colorado's insistence, those two matters had been dropped from the committee's investigation agenda. Kansas had a right to have its complaints "promptly

investigated" and not sidetracked by Colorado's belief that other factors might have more likely caused the decline in stateline flows. (Article VIII-H)

The well issue came up again at the Compact Administration's annual meeting on December 10, 1985. Kansas asked Colorado directly whether it would be ". . . willing to immediately begin a prompt and expeditious investigation of post-Compact alluvial well development in the Arkansas River Basin in Colorado. (Appendix Exh. 39, p. 107) Kansas never received an affirmative reply.

At that meeting, Kansas also presented a report from the nationally known consulting firm of S. S. Papadopulos & Associates. The report concluded that the investigation methodology proposed by Colorado, namely, focusing first on separate factors like climatic conditions, would not "produce meaningful conclusions regarding the alleged violations"; that the various possible factors must be examined contemporaneously, "regardless of preconceived notions as to the relative effects of any one factor"; and that studies had demonstrated that groundwater development and reservoir regulation "impact significantly the streamflow conditions within the river system," and "must be included" in order properly to investigate Kansas' allegation. (Appendix Exh. 39, Exh. E, pp. 5-6)

Kansas filed its motion with the Supreme Court six days later on December 16, 1985, having previously announced after the October 8 meeting that the States were at an impasse, and that such an action was being prepared. (Appendix Exh. 38)

Turning now to the operations of Trinidad Reservoir, Colorado concedes that Kansas first complained about this issue in 1980. (Colo. Br. pp. 9, 24) Through an administrative practice known as "rollover," Kansas alleged that additional water was stored in Trinidad Reservoir, in violation of the Compact. The Administration found that the amount involved for 1979 was 18,290 acre-feet. (Appendix Exh. 13) At a Compact Administration meeting in 1980, Kansas sought to have the Administration recommend that the State Engineer of Colorado order the release of such stored water, but Colorado voted "no." (Appendix Exh. 13, Colo. Br. p. 9) The rollover practice was continued, and Kansas contends that by 1982 some 58,514 acre-feet of water had been illegally stored. (Kansas' Response, p. 27) Admittedly, Kansas sought arbitration of this issue in 1982, in 1983 and again in 1985. (Appendix Exh. 16, pp. 78, 87; Exh. 28, pp. 168-170) Colorado declined, due to the "failure of the State of Kansas to identify the underlying factual basis for its claims." (Appendix Exh. 16, pp. 88, 85)

In 1983, therefore, Kansas undertook its own study, hiring Simons, Li & Associates, Inc. That study was completed in February, 1984 and concluded in part:

> "Since 1979, the Trinidad Project has been operated in a manner different than that envisioned by the Bureau of Reclamation and that approved by the Compact Administration. It is estimated that these deviations in the Trinidad Project operation have caused an additional 26,000 to 35,000 acre-feet of depletions to downstream water users." (Appendix Exh. 21, p. iii)

As previously indicated, the Trinidad issue was finally included as part of the investigation authorized by the Compact Administration on March 28, 1985. However, like the well development issue, Trinidad was dropped on October 8, 1985.

Colorado's principal argument with respect to Trinidad Reservoir is that reservoir operations are currently being reviewed and analyzed by the United States Bureau of Reclamation. Colorado claims that the Bureau's study, which was begun in 1984, embraces all of Kansas' complaints. The study was requested by the Compact Administration following the Simons, Li report, but was also independently required as part of a five-year review procedure. The Bureau's final report is expected at any time. Two draft reports have been issued earlier, and Kansas maintains that there are both "methodological and legal objections" to the last draft. (Kansas Response, p. 29) However, the scope and efficacy of the Bureau's study are not the issue. There is nothing to show that a routine, though timely, study by the Bureau constitutes a Compact investigation. Indeed, the Compact administration presumably would not have included the operations of Trinidad Reservoir within its March 28, 1985 investigation if the Bureau's study had been intended to serve that function. The Bureau's study may provide valuable data on the issue, but it is not a substitute for action by the Compact Administration to investigate Kansas' complaints.

The decline of Arkansas River flows into Kansas appears to be admitted. At issue are the cause or causes, and whether Compact violations are involved. Kansas has made good faith allegations of such violations, and

has presented preliminary studies to support its position. Certainly the future effectiveness of the Compact Administration requires timely resolution of these allegations. However, the Administration structure is such that even a preliminary investigation of the allegations has not proceeded. By exercising its veto on the Commission, though done in good faith, Colorado has effectively prevented "authoritative Commission action." (cf. *Texas v. New Mexico, supra*, 462 U.S. 554, 568)

The Special Master believes that Kansas has met its obligations under the law, and that returning these issues to the Compact Administration would not prove effective, nor would further delay be fair. Accordingly, Colorado's Motion is hereby denied.

DATED: October 21, 1988

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL
(1013A, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

BEST, BEST & KRIEGER, 3750 University Avenue, 400 Mission Square, P.O. Box 1028, Riverside, CA 92502. *On* October 21, 1988, *I served the within* DECISION OF SPECIAL MASTER ON COLORADO MOTION TO STAY *on the* interested parties listed below *in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Riverside, California *addressed as follows:*

Richard A. Simms, Esq.
Attorney at Law
P.O. Box 280
Santa Fe, NM 87504

David W. Robbins, Esq.
Hill & Robbins
100 Blake Street Building
1441 Eighteenth Street
Denver, CO 80202

Patricia Weiss, Esq.
U. S. Department of Justice
Land & Natural Resources Division
10th & Pennsylvania Avenues N.W.
P.O. Box 663
Washington, D.C. 20044

Andrew F. Walch, Esq.
U. S. Department of Justice
Land & Natural Resources Division
3305 Federal Building
650 Capitol Mall
Sacramento, CA 95814

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on October 21, 1988 *at* Riverside, *California*
(date) *(Place)*

/s/ Sandra L. Simmons
Signature
Sandra L. Simmons

APPENDIX - Exhibit 6

Order re Kansas Motion to Bifurcate Proceedings, filed January 2, 1990

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant.	)	No. 105, Original October Term, 1985

ORDER RE KANSAS MOTION TO BIFURCATE PROCEEDINGS

(Filed Jan. 2, 1990)

On May 19, 1989, Kansas filed a Second Motion to Amend Complaint and to Bifurcate Proceedings. The proposed amendment to the Complaint has been ruled upon, but not the bifurcation motion. Kansas urged in its motion that "[A]ll proceedings relating to damages or compensation" be severed and reserved for subsequent proceedings after a final decision on liability. Colorado initially opposed the motion, arguing that the issues of liability and damages were so intertwined in this case that they could not be separated and still satisfy the criteria of Rule 42(b). Colorado was especially concerned that the bifurcation sought by Kansas might prejudice its ability to present evidence in support of its counterclaim and affirmative defenses of laches, estoppel, waiver and unclean hands.

At the hearing on November 6, 1989, the Special Master assured Colorado that no bifurcation of issues would impair Colorado's ability to present its affirmative defenses or counterclaim as part of the liability phase of

the trial. Subject to that condition, however, the Special Master outlined certain advantages of severing the entire remedy phase of the trial, including any monetary damages and expert testimony thereon, until the liability issue has been decided and the amounts of shortage, if any, have been determined.

After further discussion, counsel for Kansas stated his general support for such a bifurcation of the remedy phase of the trial. Colorado did not disagree, but continued to stress its primary concern that any bifurcation order not preclude Colorado from presenting "economic testimony" during the liability phase of the trial. Record of November 6, 1989, at 88. Counsel for Colorado explained that he wanted the ability, as part of any consideration of liability, to address the relationship between water use practices in both states and the economics of those practices, in order to assist in explaining why certain things were done and why certain changes occurred. The United States was not present at the November 6 hearing, but previously had stated that it took no position on the Kansas motion to bifurcate.

The underlying issue in this case is whether the State of Colorado and its water users, in violation of the Compact, have caused a material depletion in the usable quantities or availability of the waters of the Arkansas River for use by the water users in Kansas. If Kansas fails to show such a violation of the Compact, then of course it has no grounds for relief. Assuming, however, that liability is established, the remedy phase of the trial then promises to be complex and possibly quite lengthy. Kansas seeks both injunctive relief and damages. It has also indicated that it may propose the replacement of native

Arkansas River water with currently unused transmountain water. Moreover, the recent settlement in *Texas v. New Mexico* has left unresolved major issues over the way in which any monetary damages may be computed. The Special Master believes that these various remedy issues can best be addressed after liability has been determined, and any water shortages to Kansas have first been quantified.

Accordingly, and pursuant to Rule 42(b), the trial of this case will be bifurcated into a liability and a remedy phase, provided that the State of Colorado shall not be limited during the liability phase from introducing such economic or other evidence or testimony related to any damage that may be necessary to its defense on the issue of liability, or in support of its affirmative defenses or counterclaims. *See Texas v. New Mexico*, 446 U.S. 540 (1980); 462 U.S. 554 (1983); and 482 U.S. 124 (1987); *Smith v. Alyeska Pipeline Serv. Co.*, 538 F.Supp. 977 (D. Del. 1982); *Gasoline Products Co. v. Champlin Refining Co.* 283 U.S. 494, 500 (1931).

DATED: January 2, 1990

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 400 Mission Square, 3750 University Avenue, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On January 2, 1990, I served the within ORDER RE KANSAS MOTION TO BIFURCATE PROCEEDINGS, by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

Richard A. Simms, Esq.
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1441 Eighteenth Street
Denver, Colorado 80202

Patricia Weiss, Esq.
U.S. Department of Justice
Land & Natural Resources Division
General Litigation Section, Room 829
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P.O. Box 663
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Andrew F. Walch, Esq.
U.S. Department of Justice
Land & Natural Resources Division
U.S. Federal Building
1961 Stout Street, #690
P.O. Drawer 3607
Denver, Colorado 80202

On January 2, 1990, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on January 2, 1990, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons

APPENDIX - Exhibit 7

Order re Pre-Trial Discovery and Procedures, filed March 7, 1990; Order Amending Order re Pre-Trial Discovery and Procedures, filed May 25, 1990

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant.	)	No. 105, Original October Term, 1985

ORDER RE PRE-TRIAL DISCOVERY AND PROCEDURES

(Filed Mar. 7, 1990)

This Order is intended to govern the discovery procedures for expert witnesses and certain other pre-trial issues. Additional pre-trial orders may still be required. This Order arises from a Pre-trial Conference held on February 16, 1990 before the Honorable Arthur L. Littleworth, Special Master. Appearing at the conference on behalf of Petitioner, State of Kansas, were Richard A. Simms, Esq. and John B. Draper, Esq. Appearing on behalf of Respondent, State of Colorado, were David W. Robbins, Esq. and Dennis M. Montgomery, Esq. Appearing on behalf of Intervenor, United States of America, was David Shuey, Esq. This Order has been prepared after extensive discussion with counsel and after consideration by the Special Master of proposed draft pre-trial orders prepared, respectively, by counsel for the State of Colorado and counsel for the State of Kansas. Based upon that discussion and review,

IT IS HEREBY ORDERED as follows:

I.

STATEMENTS OF ENTITLEMENT UNDER THE PROVISIONS OF THE COMPACT

For the purpose of furthering the Special Master's understanding of the issues and positions of the parties in this case, and in response to certain discovery issues, Kansas and Colorado by April 2, 1990 shall each file and serve on the other parties a statement setting forth their respective views on the entitlements of each State under the Arkansas River Compact to receive or use the waters of the Arkansas River. These statements shall be complete and shall take into account all provisions of the Compact. The United States may, but is not required to, also submit its views on the subject.

II.

DESIGNATION OF ADDITIONAL EXPERT WITNESSES BY THE STATE OF KANSAS

By motion filed February 15, 1990, the State of Kansas sought leave of the Special Master to designate five additional expert witnesses. That motion is hereby granted. Colorado indicated at the Pre-trial Conference that it did not intend to designate any additional experts. It is understood that the expert identifications required and made on January 15, 1990, together with the additional designations authorized hereby, do not include any experts required in any damage phase of the trial. Nor does this Order cover any rebuttal witnesses or exhibits.

III.

STATEMENT OF THE FACTS AND OPINIONS OF KANSAS' EXPERTS

Not later than Monday, April 2, 1990, the State of Kansas shall provide a statement of the substance of the facts and opinions to which its experts are expected to testify and a summary of the grounds for each opinion stated, as required by Rule 26(b)(4)(A)(i).

IV.

SCHEDULE FOR DEPOSITIONS FOR KANSAS' EXPERTS BY COLORADO AND THE UNITED STATES

The State of Colorado and the United States of America will be permitted to begin discovery of Kansas' experts by deposition and by subpoena *duces tecum* on Friday, April 6, 1990. Colorado and the United States shall have a right to depose Kansas' experts for a period of two months concluding Wednesday, June 6, 1990. Depositions of the experts for Colorado and United States will follow as provided in Section VI hereof. The following rules, *inter alia,* shall apply to these depositions:

A. The parties have indicated that they will cooperate in the scheduling of individual depositions of expert witnesses, and no additional orders in that regard are now required.

B. No subpoenas will be necessary to ensure that identified witnesses appear at and bring documents to depositions, except for witnesses who will not appear voluntarily and over whom the parties have no control.

Listing the documents requested on the notice of deposition will be sufficient.

C. If it develops in the course of any deposition that an expert has relied upon material not in possession of the deposing party, such material shall be provided promptly to all parties.

D. During the two-month period of time, other discovery by any party (except for depositions of Colorado's and United States' experts) shall not be precluded, provided and to the extent such discovery does not interfere with the deposition of Kansas' experts by Colorado and the United States.

E. The scope of authorized discovery, both as to depositions and the production of documents, of the expert witnesses designated by the State of Kansas shall encompass the following:

1. All instructions to the expert, not otherwise privileged, relating to the scope of his or her assignment, including all documents relating thereto;

2. All data, documents, interview notes or other material relied upon or reviewed by the expert in preparing for testimony; provided that material reviewed but not relied upon need not be produced except upon special showing.

3. All notes, records, draft reports, preliminary reports, or other preliminary materials prepared by a designated expert witness; provided that the production of draft or preliminary material shall not be required unless the expert

has changed any opinion expressed therein, or upon other special showing.

4. All final reports, exhibits, charts, graphs, tables or other materials prepared by the expert.

F. Based upon the representations of counsel, the Special Master understands that for budgetary reasons experts for the State of Kansas have not prepared final reports which set forth their opinions and the grounds therefor. The Special Master expects, however, that the State of Kansas will endeavor to organize whatever written documents have been prepared by its experts in a way that will expedite discovery by Colorado and the United States. Should the absence of final reports for Kansas' experts unduly delay discovery by Colorado and the United States, the Special Master will reconsider the time required for expert discovery.

G. Expert depositions by Colorado and the United States shall proceed, insofar as practical, without interruption. If such depositions can be completed in less than the allotted two months, this shall be done. In such event the two months allowed for expert depositions by Kansas shall be advanced from the June 8 commencement date set in Section VI hereof. Likewise, the statements required of Colorado and the United States in Section V shall be provided at least four days before Kansas begins.

H. The resolution of any discovery disputes arising during depositions shall be undertaken at the time of the

deposition, by telephone to the Special Master, or as soon thereafter as is possible.

V.

STATEMENT OF FACTS AND OPINIONS OF COLORADO AND UNITED STATES EXPERTS

Not later than Monday, June 4, 1990, the State of Colorado and the United States shall each provide a statement of the substance of the facts and opinions to which their expert witnesses are expected to testify and the summary of the grounds for each opinion stated, as required by Rule 26(b)(4)(A)(i).

VI.

SCHEDULE FOR DEPOSITIONS FOR COLORADO'S AND UNITED STATES' EXPERTS BY KANSAS

The State of Kansas will be permitted to begin discovery of Colorado's and United States' experts by deposition and by subpoena *duces tecum* on Friday, June 8, 1990. Kansas shall have a right to depose Colorado's and the United States' expert witnesses for a period of two months concluding Wednesday, August 8, 1990. Corresponding rules to those set forth in Sections IV A, B, C, D, E and H shall also apply to these depositions by Kansas.

VII.

AGREEMENTS REGARDING DEPOSITIONS OF EXPERTS, INCLUDING FEES AND EXPENSES

Discovery of experts by deposition shall be precluded except as provided herein or as agreed to by the

parties. Each party shall pay the expert fees and expenses to depose another party's expert witnesses; provided, however, that such fees and expenses shall be limited to the time actually spent in deposition and the reasonable expenses of travel, hotel and meals if the deposition is scheduled at a location other than where the expert witness resides or has his or her principal place of business. The parties agree that depositions of all experts may be taken in Denver, Colorado, and that the party electing to take the deposition of an expert who does not reside or have his or her principal place of business in Denver, Colorado, shall pay the travel expenses of such expert, including airfare and reasonable expenses for hotel and meals during the deposition, in order to take such depositions in Denver, Colorado. The attorneys agree to make the expert witnesses identified by the party they represent available for deposition in accordance with his schedule. In the event any expert is not available to be deposed in accordance with the schedule provided for in this Order for any reason, the parties shall attempt to agree on alternative dates for such deposition, and a modification of the schedule herein. If the parties cannot agree, the party desiring to take the deposition may apply to the Special Master to schedule the deposition and to make such modification as the Special Master deems fair and just under the circumstances.

VIII.

DISCLOSURE OF NON-EXPERT WITNESSES BY COLORADO

By Friday, June 15, 1990 the State of Colorado shall identify all of its non-expert witnesses who are expected

to testify at trial, including their addresses and telephone numbers, together with a summary of testimony of each such witness.

IX.

PRE-TRIAL STATEMENTS

On or before Wednesday, August 15, 1990, the parties shall file pre-trial statements setting forth any stipulations concerning joint exhibits, any admissions of fact, data or documents, a statement of disputed issues of fact and law, and a list of exhibits which may be offered at trial. In addition, the pre-trial statements of Kansas and the United States shall identify all of their non-expert witnesses who are expected to testify at trial, including their addresses and telephone numbers, together with a summary of the testimony of each such witness.

By Wednesday, August 29, 1990, the parties may petition the Special Master for leave to add the name of any additional non-expert witness who could not reasonably have been anticipated to be required as a witness until after the initial identification of non-expert witnesses by others, and for leave to add any additional exhibits which could not reasonably have been anticipated to be required until after the initial designation of exhibits by others. Thereafter, additional exhibits may not be endorsed or offered, except for impeachment or rebuttal exhibits, with the following limited exception: a party may petition the Special Master to admit additional exhibits or testimony whose existence was not known or could not have been foreseen or on the grounds that the ends of justice require, and the Special Master may admit

such exhibits or testimony at his discretion, but only on such conditions as the Special Master deems just under the circumstances and which can be permitted without undue prejudice to other parties.

X.

EXCHANGE OF COPIES OF EXHIBITS; OBJECTIONS TO AUTHENTICITY OF EXHIBITS

Except for any joint exhibits to which the parties may have agreed, the parties shall provide copies of all exhibits to other parties by Wednesday, August 15, 1990, unless photocopying is impractical because of the size or unusual length of the exhibit, in which case the exhibit shall be made available for inspection in Denver, Colorado. The authenticity of all documents designated as exhibits shall be deemed admitted unless a party files a written statement by August 29, 1990, identifying the specific documents, the authenticity of which are not admitted.

XI.

DATES FOR FILING PRE-TRIAL MOTIONS

All pre-trial motions shall be filed no later than August 15, 1990.

XII.

CUT-OFF DATE FOR ALL DISCOVERY

To enable the parties to prepare for trial, no discovery shall be conducted or required after August 8, 1990,

except for non-expert witness depositions which may be taken until August 31, 1990.

XIII.

TRIAL DATE

To permit full and fair discovery by all parties, and at the request of both States, the trial date now set for July 16, 1990 will be vacated and the trial date reset to commence Monday, September 17, 1990.

XIV.

This Order may be amended for good cause shown.

DATED: March 7, 1990.

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 400 Mission Square, 3750 University Avenue, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On March 7, 1990, I served the within ORDER RE PRE-TRIAL DISCOVERY AND PROCEDURES by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

Richard A. Simms, Esq.
Simms & Stein
First Northern Plaza, Suite A
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Santa Fe, New Mexico 87501

David W. Robbins, Esq.
Hill & Robbins
100 Blake Street Building
1441 Eighteenth Street
Denver, Colorado 80202

Patricia Weiss, Esq.
U.S. Department of Justice
Land & Natural Resources Division
General Litigation Section
P.O. Box 663
Benjamin Franklin Station
Washington, D.C. 20044-0663

Andrew F. Walch, Esq.
U.S. Department of Justice
Land & Natural Resources Division
U.S. Federal Building
1961 Stout Street, #690
P.O. Drawer 3607
Denver, Colorado 80202

On March 7, 1990, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on March 7, 1990, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons

STATE OF KANSAS, Petitioner, v. STATE OF COLORADO, Respondent.	No. 105, Original United States Supreme Court October Term, 1985

ORDER AMENDING ORDER RE PRE-TRIAL DISCOVERY AND PROCEDURES

(Filed May 25, 1990)

By motion, the State of Colorado seeks: (1) an extension of one week in the period of time provided for its discovery of Kansas' expert witnesses by the Order re Pre-Trial Discovery and Procedures filed March 7, 1990; (2) a one week extension of the date for it and the United States to provide a statement of the substance of the facts and opinions to which their expert witnesses are expected to testify; and (3) a delay of one week of the date upon which Kansas may begin depositions of Colorado's and the United States' experts. The State of Kansas, by letter addressed to the Special Master, has indicated that it does not oppose the requested extension of Colorado's discovery period.

Good cause appearing therefore,

Colorado's motion to extend the period in which it may depose expert witnesses of the State of Kansas by one week is hereby granted. Paragraph IV of the Order re Pre-Trial Discovery and Procedures heretofore filed on March 7, 1990 is amended to provide that Colorado and

the United States shall have a right to depose Kansas' experts for a period concluding Wednesday, June 13, 1990. Further, Paragraph V of the Order re Pre-Trial Discovery and Procedures is amended to provide that the State of Colorado and the United States shall have until Monday, June 11, 1990 to provide a statement of the substance of the facts and opinions to which their expert witnesses are expected to testify and the summary of the grounds for each opinion stated. Finally, Paragraph VI of the Order re Pre-Trial Discovery and Procedures is amended to provide that discovery by the State of Kansas of Colorado's and the United States' experts by deposition and by subpoena duces tecum shall commence on Friday, June 15, 1990 and continue for a period of two months concluding Wednesday, August 15, 1990.

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County of Riverside; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 400 Mission Square, 3750 University Avenue, Riverside, California 92501.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On May 25, 1990, I served the within ORDER AMENDING ORDER RE PRE-TRIAL ORDER DISCOVERY AND PROCEDURES by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

Richard A. Simms, Esq.
Simms & Stein
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121 Sandoval Street
Santa Fe, New Mexico 87501

David W. Robbins, Esq.
Hill & Robbins
100 Blake Street Building
1441 Eighteenth Street
Denver, Colorado 80202

Patricia Weiss, Esq.
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Andrew F. Walch, Esq.
U.S. Department of Justice
Land & Natural Resources Division
U.S. Federal Building
1961 Stout Street, #690
P. O. Drawer 3607
Denver, Colorado 80202

On May 25, 1990, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92501, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this Proof of Service is executed on this 25th day of May, 1990 at Riverside, California.

/s/ Linda Hutton
Linda Hutton

APPENDIX – Exhibit 8

Order re Kansas Motion for Continuance,
filed March 27, 1991

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant.	)	No. 105, Original October Term, 1985

ORDER RE KANSAS MOTION FOR CONTINUANCE

(Filed Mar. 27, 1991)

The trial in this case began on September 17, 1990. While counsel for all parties originally estimated that the first phase[1] of the trial would require between two and three months, Kansas still had not completed its case when the trial was temporarily recessed on February 20, 1991, after some 57 trial days.

The first Kansas witness was Dr. Douglas R. Littlefield, an historian, who testified extensively on the events leading up to the 1949 Arkansas River Compact, and on the negotiation of the Compact itself. His testimony and cross-examination extended over 11 trial days, from September 18 to October 16, 1990. He provided support for the Kansas position concerning the intent of the Compact, Kansas' entitlement thereunder, and the Colorado obligations.

---

[1] The trial was bifurcated by Order dated January 2, 1990. The first phase relates to liability only. If liability is established, then the trial will resume for the remedy phase, including damages.

Kansas then followed with a number of witnesses, primarily experts, who presented evidence on what has occurred since the Compact was approved in 1949. Much of this evidence consisted of basic hydrologic and land use data that was also used in the development of the Kansas "hydrologic-institutional" computer model. Although Colorado has yet to begin its case, it is clear from the pretrial statements and from cross-examination that much of this voluminous basic information is in dispute.

For example, post-Compact groundwater pumping in Colorado, and its impact on the flows of the Arkansas River reaching Kansas, certainly constitute major issues in this case. Yet there are no official records that fully detail the large number of wells that have been drilled since 1949, nor the amounts of water that have been pumped over the years. Groundwater production must be estimated through the use of utility records for those wells equipped with electric motors, but a sizable number of wells are fueled with natural gas, for which no comparable utility records are available. Records are also lacking on the number of acres irrigated and the kinds of crops grown. The crop mixture, of course, affects the amount of water used. Agricultural usage must therefore be pieced together from various records, surveys, and aerial photographs. Streamflow records are also incomplete. While flows of the Arkansas River are gauged at numerous points, and those measurements do not seem to be in dispute, many of the tributaries are not gauged at all, and others have only incomplete records. The patterns of historic flows in the Arkansas River have also been altered by the operation of three large reservoirs in

Colorado. Moreover, in recent years, large amounts of water from the western slopes of the Rocky Mountains, to which Kansas claims no rights, have been imported to augment the Arkansas River Basin supplies in Colorado.

These are not the only areas of important factual dispute, but they serve to illustrate the complexity of determining the impact of changes that have occurred since 1949, and whether such changes constitute one or more violations of the Arkansas River Compact.

The chief technical expert for the State of Kansas has been Timothy J. Durbin. He began his work for Kansas in 1985, investigating various possible causes for the depletion of flows in the Arkansas River at the Colorado-Kansas state line. He took the stand on January 14, 1991. In the vernacular of the baseball season, he was Kansas' cleanup hitter. He took much of the evidence introduced by earlier Kansas expert witnesses, blended it into his own investigation, and reached specific conclusions about the causes of depletion in stateline flows. His conclusions were derived from three separate approaches: a statistical analysis, a water budget analysis, and the results of a complex hydrologic-institutional model of the Arkansas River Basin. Only through the model, however, did he allocate specific amounts of depletion to specific causes. For example, he prepared a summary matrix (Kansas Exhibits 111* and 112*) that showed what the stateline flows would have been in the absence of post-compact well pumping in Colorado, and separately, the amount of reduction in stateline flows caused by the winter water storage program in Colorado. Kansas maintains that both of these constitute Compact violations. Mr.

Durbin completed his testimony on January 24, 1991, and cross-examination by Colorado began on the same day.

During cross-examination, a number of mistakes were uncovered in certain Kansas exhibits. Some were merely plotting errors, e.g., discrepancies between actual tabulated data and the graphs or summaries portraying those data on display exhibits. Some errors, however, were more substantive, and some affected the program coding instructions used in the model. Kansas began to respond by overnight preparation of revised exhibits.[2] Mr. Durbin had the responsibility of explaining the revisions, but in some instances a second or third revision was offered even before there had been any opportunity to testify on the first. Errors in coding or handling data in the model presented even more difficulties. Mr. Durbin stated that more time would be required for these analyses and changes.[3] It was finally agreed that Mr. Durbin would be withdrawn from the stand and given time to correct the errors in the model and other Kansas exhibits, as might be appropriate, and then would return for additional examination at a time to be worked out. (Rep. Tr., LIV, Feb. 14, p. 101)

Kansas then called as its next witness Dr. Lawrence J. Lefkoff, who had assisted Mr. Durbin and had direct

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[2] For example, on January 28 Kansas offered 13 revised exhibits, and the next day produced another 10.

[3] Colorado indicated that the error with respect to the winter water storage program had a major impact. It claimed that when monthly flows were properly adjusted, the result would show that the winter water storage program had no adverse effect on stateline flows, thus eliminating one of Kansas' claims.

responsibility for certain aspects of the model. His direc testimony, apart from that related to revisions of the model, was completed on February 15.

The trial resumed on February 19. At the outset, Mr. Simms, counsel for Kansas, reported in chambers that Mr. Durbin had been admitted over the weekend to a psychiatric hospital with severe depression. At that time, Mr. Simms had not been able to contact Mr. Durbin's physician directly, and he had little additional information. The trial proceeded with the cross-examination of Dr. Lefkoff, while Mr. Simms attempted to learn more.

On the next day, February 20, an extensive conference was held in chambers, and summary statements were then made to the court reporter. That transcript was ordered sealed, except as it was necessary for counsel to advise their parties of what had occurred and the reasons for delay. Essentially, however, counsel for Kansas indicated that Mr. Durbin would not be able to work on the case for at least three months, and perhaps would not be able to return at all. Colorado requested that the services of an independent Board-certified psychiatrist be secured to review Mr. Durbin's situation and then report to the Master. Colorado stated that it would pay for the cost of such an examination and report. Colorado also argued that any extended postponement in the trial was unnecessary and would be highly prejudicial to Colorado, no matter what Mr. Durbin's future condition might be. At the conclusion of that session, Kansas was ordered to file a written motion for continuance by March 1, Colorado's request for an independent medical opinion was approved, and at the close of the day the trial was

recessed until further order. At that time, Dr. Lefkoff's cross-examination was not completed.

Kansas' written motion seeks a continuance of seven months. It is based upon a brief affidavit from Jean A. Warren, M.D., Mr. Durbin's attending psychiatrist, stating that he is suffering from a major depression; that three months will be required for treatment and convalescence; and that he would then most likely be able to return to his customary work, but there is no guarantee of that fact. The Kansas motion states that it intends to expand the roles of several expert witnesses already involved in the case in order to fill the void created by Mr. Durbin's illness. The principal replacement appears to be Steven P. Larson. His affidavit states that three months would be required "to come up to Mr. Durbin's level of knowledge," and because of prior commitments in a number of other cases, a minimum of seven months would be required for him to be able to testify here.

Colorado filed a response, objecting to such a lengthy continuance, and indicating that if this were ordered the case would actually have to go over for at least a year. Colorado's chief counsel is scheduled to try another major water case in October, 1991, and a number of the expert witnesses here are also involved in that case. Colorado had reported this commitment early on, but under the original scheduling of this case, there did not appear to be any conflict.

Colorado is skeptical about the need for any lengthy delay. It argues that the Kansas case is almost complete, and that the expected revisions in programming the model can be done by Dr. Lefkoff. Indeed, Mr. Durbin

testified that most of the problems were being analyzed by Dr. Lefkoff and necessary coding changes were being made by him.[4] However, there were parts of Mr. Durbin's testimony that were also under revision (including the statistical and water budget analyses), and Dr. Lefkoff had not participated in that work.

In its motion, Kansas also argued that Mr. Durbin would be needed to assist Kansas counsel in the cross-examination of Colorado experts on phreatophytes and pumping estimates, as well as on modeling. (Motion, p. 3) Colorado properly points out, however, that Dr. Groeneveld and Mr. Book, respectively, were the Kansas experts on phreatophytes and groundwater pumping. (Colorado Response, p. 15) Mr. Durbin was not listed as a witness on either of these subjects, nor on basic data. In fact, most of the basic data used in the Kansas hydrologic-institutional model came to Mr. Durbin from other Kansas experts.

With the consent of Dr. Warren, I did arrange for a second opinion from a Board-certified psychiatrist, Dr. Robert M. Bittle. He examined Mr. Durbin on March 2,

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[4] Mr. Durbin testified that Dr. Lefkoff was doing the work associated with program changes on the winter water storage program, and in the distribution of recharge in irrigated areas. (Rep. Tr., LIII, February 13, pp.8-10) Moreover, Mr. Durbin identified a number of other problem areas that were being reviewed by Dr. Lefkoff and that would probably require corrections by him: use of native flows in District 67, transit losses, "want factors" for the Buffalo Canal, Kansas calls for water, storage of Amity water in John Martin Reservoir, off-channel storage when two storage rights are involved, and negative streamflows. (Rep. Tr., LIII, February 13, pp. 9, 10, 78, 80, 82-85)

1991, in his office for approximately three hours. This was the day that Mr. Durbin was released from Heritage Oaks, a psychiatric hospital in Sacramento. He had been admitted on February 16. Dr. Bittle also completed certain psychological testing, reviewed the hospital records, and interviewed Mrs. Durbin.

On March 8, I received an 18-page single-spaced report from Dr. Bittle. It was extremely comprehensive and included much information that I felt should be kept confidential. I did not forward a copy of this report to counsel, but I did promptly mail them a copy of his recommendations. Dr. Bittle's diagnosis was: "Major depressive illness, recurrent, without psychotic features, in partial remission." He felt that in approximately four weeks Mr. Durbin would be able to resume his trial duties. He informed me that Mr. Durbin was in agreement, and wanted to return.

On March 12 I arranged a conference telephone call with all counsel. While not discussing Dr. Bittle's report in detail, I indicated that there was no doubt that Mr. Durbin's condition leading to his hospitalization was indeed serious. Nonetheless, in view of Dr. Bittle's recommendation, I suggested that we return to court on April 8, that we finish what little remained on the Kansas case (except for the various exhibit and model revisions still under way), and that Colorado then begin its case, starting with subjects that would not require Mr. Durbin's participation. Colorado and the United States were in general agreement with this suggestion, but Kansas asked that I hold my decision until its reply brief had been received.

The Kansas reply brief included an additional affidavit from Dr. Warren, and two separate affidavits from church counselors who indicated that they had been counseling Mr. Durbin and his family since 1986. Each of these affiants disagreed with Dr. Bittle. Moreover, the two counselors indicated that they had spoken recently with Mr. Durbin and that he did not believe he would be ready to return to the trial within a month. I called Dr. Bittle and relayed these additional opinions to him. He said that he wanted to talk again with Mr. Durbin and that he would get back to me as soon as possible.

Dr. Bittle called on March 19. In substance, he reported that Mr. Durbin appeared to be a different person from the man he had seen just after his release from the hospital, that Mr. Durbin no longer believes that he can participate, and, without discussing the reasons here, that Dr. Bittle agrees. A confirming letter has also been received from Dr. Bittle. From my conversations with Dr. Bittle, and my review of all of the medical reports, I have concluded that Mr. Durbin should not be pressured into returning, and that we must assume that he will not be able to resume his trial responsibilities soon, if at all.

Colorado argues, nonetheless, that Dr. Lefkoff should be able to replace Mr. Durbin since they "were jointly listed as expected to testify to the same facts and opinions." (Response, p. 11) It was clear, however, from the depositions and from the Kansas direct testimony that Dr. Lefkoff's responsibilities were much more limited than those of Mr. Durbin. His model responsibilities were confined to the development of the administrative and land modules of the overall model, and running the model to calculate stateline depletions. (Rep. Tr., LIV, Feb. 14, at p.

112) Most of the work done in relation to the precipitation-runoff modeling, and the groundwater modeling, was done prior to Dr. Lefkoff's employment. (Dr. Lefkoff deposition, May 15, 1990, at pp. 10-11) Nor did he have responsibilities for the statistical and water budget analyses presented by Mr. Durbin, and for which possible revisions are still pending. But perhaps of overriding importance is the fact that Mr. Durbin was Kansas' "principal expert in the critical area of hydrology," and Kansas should be entitled to select a replacement expert, if that is necessary, of equal experience and stature. (Kansas Reply, p. 23) While Kansas indicates that Dr. Lefkoff's role will be expanded, as will that of Spronk Water Engineers, Kansas has asked Steven P. Larson of S. S. Papadapulos to be the primary replacement for Mr. Durbin. It is his schedule that drives the motion for a seven month continuance.

Both States acknowledge that the granting of a continuance during trial lies within the sound discretion of the trial court. (Kansas Brief, pp. 2-3; Colorado Response, p. 9; *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1570 (CA 5 1989); *Harmon v. Grande Tire Co., Inc.*, 821 F.2d 252, 256 (CA 5 1987)) Moreover, Special Masters have broad discretion in procedural matters relating to the receipt of evidence and the order of witnesses. The Federal Rules of Civil Procedure are advisory only. (Sup.Ct.Rule 17.2; see *California v. Southern Pacific Co.*, 157 U.S. 229, 249 (1895); *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973))

In view of Mr. Durbin's unique role in the development and presentation of the Kansas case, and the important sovereign interests that are involved in this case, the

completion of the Kansas case on direct, and any rebuttal evidence, will be continued until either Mr. Durbin is able to resume the stand, or his replacement or replacements are prepared and available.[5] I will determine later the specific time for resuming this part of the trial, but such scheduling will not interfere with Mr. Robbins' prior trial commitment in October of this year. Nor should the delay otherwise be longer than is actually necessary.

This continuance is not granted to allow Kansas, as Colorado fears, "to redo its case." (Colo. Response, p. 9) Rather, it is intended only to allow Kansas to complete its case, and in particular, to remedy the errors in the model and other exhibits that were identified during cross-examination. Colorado suggests that this task should not be large, but having to defend revisions on the stand may invoke even more intense cross-examination than occurred originally. Kansas is relying upon the testimony of Mr. Durbin, or his replacement, to quantify the shortage in stateline flows, and to allocate the shortage among specific causes. No witness who carries this burden can afford to testify with less than full preparation.

The Kansas motion would also suspend the beginning of the Colorado case in chief. Kansas argues that it must have adequate expert assistance in order to evaluate the expert testimony and exhibits presented by Colorado. It says that "full access to expert assistance in the . . . defense of its case" is a fundamental due process

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[5] Dr. Danielson is an exception. He is Colorado's principal water official and is being called by Kansas as an adverse witness. He will be fitted in during the Colorado case as his schedule permits.

right, citing *Ake v. Oklahoma*, 470 U.S. 68 (1985). (Kansas Brief, p. 5) Mr. Durbin is said to be the person who was intended to fill that role. Kansas contends that effective cross-examination of the opposing party's expert may require a continuance, citing *Anzaldo v. Croes*, 478 F.2d 446 (CA 8 1973); *Nutt v. Black Hills Stage Lines*, 452 F.2d 480 (CA 8 1971); *Smith v. Massachusetts Institute of Technology*, 877 F.2d 1106, 1110-1112 (CA 1 1989).

Certain issues, however, have nothing to do with Mr. Durbin's assignments, e.g., the Compact negotiations and its meaning, the operations of the Trinidad Reservoir, and the administration of water rights in both Kansas and Colorado. Even in the areas of hydrology and land use, Kansas presented much of its evidence through other experts. Dr. Groeneveld was its witness on the use of water by phreatophytes. Spronk Water Engineers provided the basic data on groundwater pumping, irrigated acreage, water use, and streamflow measurements. Testimony on geology and groundwater movement came from John W. Shomaker. Thus, the Kansas interests on many issues can be fully protected through the assistance of its other experts, and the presence of Mr. Durbin, or his replacement, while perhaps useful, does not seem to be essential in these areas.

Colorado is prepared and has been waiting to begin its case. It does not want it to be further postponed. The prejudice resulting from a lengthy delay is obvious. Voluminous amounts of detailed information have been analyzed, assembled and absorbed by the expert witnesses for this case, but that kind of preparation cannot be kept in mind over time. I too would like to see the

Colorado basic case while the Kansas evidence is still fresh.

There can be little doubt that Kansas did intend to rely on Mr. Durbin for help with Colorado's modeling efforts. Yet even in this area, Kansas is not wholly without resources. Depositions were taken. Computer programs and data were exchanged. And, of course, Dr. Lefkoff is still available. Any substantial prejudice to Kansas can be avoided by reserving its right of cross-examination with respect to Colorado's modeling evidence.

Accordingly, it is hereby ordered that the trial resume on April 9 at 9:30 a.m. in Courtroom Three of the Court of Appeals Courthouse in Pasadena with the completion of Dr. Lefkoff's cross-examination, apart from the results of any revisions to the Kansas modeling evidence. Colorado will then begin the presentation of its case. Kansas will have the right to reserve all or part of its cross-examination with respect to Colorado's modeling testimony, and to complete such cross-examination when appropriate expert assistance becomes available, or when Kansas completes its case. In addition, the order of Colorado witnesses shall be arranged, to the extent feasible, to permit Mr. Spronk to be present on subjects within his expertise. In view of Mr. Durbin's absence, Mr. Spronk's attendance assumes greater importance, but his affidavit identifies certain difficult scheduling conflicts. If these

conflicts cannot be avoided, then Kansas' cross-examination may also be reserved on these witnesses until Mr. Spreak can be present or Kansas completes its case.

DATED: March 27, 1991

/s/ Arthur L. Littleworth
Arthur L. Littleworth,
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On March 27, 1991, I served the within **ORDER RE KANSAS MOTION FOR CONTINUANCE** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

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On March 27, 1991, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on March 27, 1991, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons

APPENDIX – Exhibit 9

Order re Admissibility of Dr. Dracup Notes
(Kan. Exh. 746), filed February 9, 1993

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Intervenor.	No. 105 Original October Term, 1985

ORDER RE ADMISSIBILITY OF DR. DRACUP NOTES (KANSAS EXH. 746)

(Filed Feb. 9, 1993)

On September 8, 1992, in accordance with applicable procedures, the United States filed a summary of the proposed testimony of Dr. John A. Dracup, a UCLA engineering professor, to be called as a surrebuttal witness. Dr. Dracup had not testified during the United States' case in chief. Nor had he been designated earlier as a possible expert witness for the United States. On September 21, 1992 Kansas moved to exclude the proposed testimony on several grounds. The Kansas motion was denied, but subject to Kansas' right to take Dr. Dracup's deposition before the surrebuttal phase of the trial commenced.

Pursuant to a deposition notice and subpoena *duces tecum*, Dr. Dracup produced for Kansas certain notes that he had taken during a meeting on July 23, 1992 with two other expert witnesses who had testified earlier for the

United States. These witnesses were Charles W. Binder and Donald J. Finlayson.

That was the first time Dr. Dracup had met with other United States experts. The meeting lasted all day. Its purpose was to give him a technical briefing, and to help him prepare for his up-coming surrebuttal testimony. He was "very anxious about coming up to speed of a three-year court case . . . ." RT Vol. 141 at 76 (Dec. 16, 1992). Dr. Dracup took 25 pages of notes, of which two are the subject of this Order. These two pages of notes were probably taken within the first half hour of the meeting.

After commencement of Dr. Dracup's deposition, but before its completion, the United States unexpectedly announced that it had decided not to call Dr. Dracup as a surrebuttal witness. Nonetheless, Kansas sought to pursue the issue of his notes, claiming that the two pages in question were admissible as an admission, or an inconsistent statement of a witness, or a statement against interest.

Both the United States and Colorado objected strenuously, arguing that the notes involved multiple levels of hearsay and that no proper foundation for their admission had been established. Moreover, they asserted that the material in question was "highly prejudicial" and should not be examined by me, even during argument as to admissibility, unless there were no alternative.[1]

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[1] In its final brief (page 2) the United States said, "It is difficult to imagine more prejudicial evidence or evidence more lacking in probative value."

Accordingly, the two pages of notes, attached to Dr. Dracup's deposition as Exhibit 1, remained sealed until resumption of trial on December 16, 1992. Messrs. Binder and Finlayson, as well as Dr. Dracup, were examined that day with respect to the hearsay and foundation issues. An expurgated version of Dr. Dracup's deposition was also admitted into evidence, without objection, as Kansas Exhibit 749. The sealed notes were not examined until it became clear that such action was necessary in order to evaluate Kansas' claim that the statements constituted an admission against the United States or an inconsistent declaration of its expert witnesses.

To begin with, I ruled from the bench on December 16 that the notes came within certain hearsay exceptions under Federal Rule 803. Although the United States has asked in its latest brief (filed February 1, 1993, page 3) that I reconsider this ruling, in my judgment it is still correct, and the ruling is hereby confirmed. While Dr. Dracup testified that he had no present recollection of the conversations during this July 23 meeting, it was undisputed that the notes were taken by him at that time. Moreover, this was an important meeting and Dr. Dracup said that he took the notes in order to stay focused, to pay close attention. He stated that the notes were his interpretation of what was being said over perhaps several minutes of time. For "complete details" of that meeting, he testified that he would have to go back to his notes. RT Vol. 141 at 74 (Dec. 16, 1992). Dr. Dracup is a Professor of Engineering and Applied Science at UCLA. Certainly his notes of such an important meeting may be viewed as being reasonably reliable, even if cryptic or if they only synthesize a period of conversation.

The specific portion of the notes in controversy reads:

CO: "We know we are guilty, but it can't be proved with any certainty" [quotation marks in original]

WWSP: Very small, if any effects — lost in the noise.

Kansas offered the two pages of Dracup notes, including the foregoing statements, as its Exhibit 746. Kansas took the position initially that the damaging statement constituted an admission by both the United States and Colorado. Kansas' Letter Brief, Dec. 9, 1992, page 8. Under Federal Rule 801(d)(2), an admission by a party-opponent is not hearsay. The statement of an expert witness can constitute an admission. However, if made by such an expert, the statement must be within the scope of the agency or employment. *Collins v. Wayne Corp.*, 621 Fed.2d 777, 781-782 (CA 5 1980); *Rollins v. Board of Governors*, 761 F.Supp. 939, 941-943 (D. R.I. 1991).

Here, the "CO" in the statement refers to Colorado, and Kansas argued that the entire statement "seems to refer to a quotation of a statement by a Colorado expert, counsel or official." Letter Brief, Dec. 9, 1992, page 8. However, Kansas was unable to present any evidence as to who that person might be. Nor did any witness have an explanation for the quotation marks around part of the statement. Accordingly, I ruled on December 16 that a sufficient foundation had not been laid to utilize the notes as an admission against Colorado, or as a statement inconsistent with the testimony of any Colorado witness. RT Vol. 141 at 61, 67 (Dec. 16, 1992). Nothing in the briefs recently filed compels a change in that ruling.

The remaining unresolved issue, on which the recent briefs have concentrated, is whether Kansas Exhibit 746 constitutes an admission against the United States, or an inconsistent statement by its expert witnesses, or a statement against interest, under Federal Rules of Evidence 801(d)(2), 804(B)(3), or 613. I have concluded that the Dracup notes are not admissible on any of these grounds.

Messrs. Binder and Finlayson both strongly denied making these statements, or anything like them. Assuming, however, that the notes do reflect what was said, the remarks are too ambiguous to constitute an admission by the United States. Looking first to the "guilty" statement, the U.S. experts may simply have been repeating a remark made by a Colorado source. The unusual quotation marks, and the reference to "CO" in the margin would seem to lead to such an inference. Indeed, Kansas has made this very argument. Letter Brief, Dec. 9, 1992, page 8. Under those circumstances, there would be no U.S. admission.

Nor is it clear that the "guilty" remark even refers to the winter water storage program, which was the only issue on which the U.S. experts testified. The "WWSP" statement may well be a separate subject from the "CO" statement. There is no reason to require a coupling of these two statements. Indeed, the text can be read as notes of two independent and unrelated subjects. The United States argues that the notes are in fact inconsistent — that the phrase "Very small, if any effects" does not fit with being "guilty". Kansas says the first statement could refer to Colorado's winter water storage program, rather than its post-compact well pumping, and that presumably the "we" would then include the United States. But

that argument does not really overcome the inconsistency between the two statements.

In short, the "guilty" remark could be an admission of the United States only if it expressed the views of Binder or Finlayson and if it referred to the Winter Water Storage Program. The evidence is simply not strong enough to support these conclusions. Fed. Rules Evid. rule 403.

Insofar as the "WWSP" note is concerned, it appears to reflect a statement by Binder or Finlayson, without the possible inference that they were merely quoting someone else. During the trial, neither of them testified to a specific impact resulting from the Winter Water Storage Program. Their evidence, rather, was directed at the Kansas analysis and conclusions, and the statement that any effect from the program was "lost in the noise" is consistent with their opinions on the Kansas evidence. They repeatedly made the point that the impacts shown by the Kansas model were less than the potential error associated with such analyses. I do not believe that this portion of the Dracup notes reflects any inconsistency with their court testimony, or any admission by the United States. Moreover, the foregoing analysis leaves no room for the suggestion that such a statement would be against the interest of either of these witnesses.

Despite ending the trial with such intense controversy over Kansas Exhibit 746, it may be worth recalling the tremendous body of evidence that has been submitted in this case. Decisions will be made on the basis of all of that evidence.

The offer to admit Kansas Exhibit 746 is hereby denied.

DATE: February 9, 1993

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On February, 1993, I served the within **ORDER RE ADMISSIBILITY OF DR. DRACUP NOTES (KANSAS EXH. 746)** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

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On February 9, 1993, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on February 9, 1993, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons

APPENDIX – Exhibit 10

Arkansas River Compact Administration Resolution Concerning an Operating Plan for John Martin Reservoir, adopted April 24, 1980, as revised May 10, 1984 and December 11, 1984

RESOLUTION
CONCERNING
AN OPERATING PLAN FOR
JOHN MARTIN RESERVOIR

WHEREAS, the Arkansas River Compact Administration, hereinafter referred to as the Administration, recognizes that, because of changes in the regime of the Arkansas River, the present operation of the conservation features of John Martin Reservoir does not result in the most efficient utilization possible of the water under its control;

WHEREAS, the Administration finds that adoption of an operating plan that establishes storage accounts for Kansas, for the ditches of Colorado Water District 67, and for other Colorado ditches as provided herein may result in more efficient utilization of the water under its control; and

WHEREAS, the Administration finds that provisions of the operating plan contained herein are permitted by and in compliance with the Arkansas River Compact, hereinafter referred to as the Compact; and the Rules and Regulations; and the Bylaws adopted by the Administration;

NOW THEREFORE, BE IT RESOLVED that the Administration approves and adopts the following operating plan:

I. Definitions:

A. "Period of winter storage" consists of the period of time commencing on November 1 of each year

and continuing to the first exhaustion of conservation storage during the compact year.

B. "Summer storage season" shall be the period of time commencing at the first exhaustion of conservation storage and continuing to and including the next succeeding October 31.

C. "Inflows" include all the normal accretions into John Martin Reservoir, measured or otherwise, including river flow but not including deliveries into the permanent pool or deliveries of other water as subsequently defined herein.

D. "Conservation storage" is water stored in the conservation pool that, but for the adoption of this resolution, would have comprised of the benefits arising from the construction of John Martin Reservoir.

E. "Other water" for regulation by John Martin Reservoir is water delivered into the accounts established in Section III, herein, and delivered under the authority of pre-Compact Colorado water rights. Deliveries of other water are permitted to gain increased utilization and greater beneficial use.

F. "Compact year" is the water accounting year of the Administration; it commences on November 1 of each year and extends to and includes the next succeeding October 31.

G. Except as provided herein, all words and terms used in this resolution have the meaning prescribed in Compact Article III.

II. Operating Principles:

A. Period of Winter Storage

All inflows into John Martin Reservoir during a period of winter storage shall accrue to conservation storage. Conservation storage shall be released into the accounts specified in Subsection II D beginning at the first request for release after March 31 of account water by a Colorado Water District 67 ditch or by Kansas or beginning at 8:00 a.m. on April 7, whichever occurs first.

B. Summer Storage Season –

(1) When a runoff event occurs during the summer storage season, such that inflows into John Martin Reservoir are expected to exceed then existing irrigation requirements of the ditches in Colorado Water District 67 by at least 1,000 acre-feet, then the gates on John Martin Reservoir shall be closed commencing conservation storage except for releases of account water pursuant to Subsection II E, herein.

(2) The ditches in Colorado Water District 67 will be removed from the Colorado priority system when the sum of the flows of the Arkansas River at the Las Animas gaging station and the Purgatoire River at the Las Animas gaging station, exclusive of separate deliveries of other water under Section III, herein, indicates that conservation storage will occur.

(3) All inflows entering said reservoir during a period of conservation storage in the summer storage season shall accrue to conservation storage. Conservation storage shall be

released into the accounts specified in Section II D beginning at the first request for release of account water by a Colorado Water District 67 ditch or by Kansas or beginning 48 hours after commencement of conservation storage, whichever occurs first.

C. Exhaustion of Conservation Storage –

(1) For the purposes of Compact Article V F, the conservation pool shall be deemed exhausted whenever conservation storage has been completely released into the accounts. When this occurs, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed. However, during these times, inflows shall, to the extent practical, be measured and released from the reservoir without temporary storage or averaging flows, and conservation storage may not be accumulated nor may storage in the accounts be increased except by deliveries of other water under Section III, herein.

(2) Administration in Colorado under decreed priorities shall be initiated so that ditches upstream from John Martin Reservoir shall deliver to the priorities of Colorado Water District 67 ditches water at the Arkansas

River at the Las Animas gaging station coincident with the exhaustion of the conservation storage when taking the flow of all waters, including that of the Purgatoire River, into appropriate consideration.

D. Release into the Accounts –

(1) When conservation storage is being released into the accounts according to the provisions of Subsections II A or II B, herein, it shall be released at the total rate of 1,000 cfs. However, when conservation storage exceeds 20,000 acre-feet, it shall be released at the total rate of 1,250 cfs.

(2) Releases of conservation storage shall be into accounts and said releases shall be apportioned 60 percent for the accounts of the Colorado Water District 67 ditches and 40 percent for the Kansas account.

(3) The releases for the Colorado Water District 67 ditches shall be distributed into individual accounts according to the following percentages:

Fort Bent	9.90 percent
Keesee	2.30 percent
Amity	49.50 percent
Lamar	19.80 percent
Hyde	1.30 percent
Manvel	2.40 percent
X-Y & Graham	5.10 percent
Buffalo	8.50 percent
Sisson – Stubbs	1.20 percent

E. Releases Out of Accounts –

(1) Kansas and the various Colorado ditches may demand the release of water contained

in their respective accounts, including those established in Section III herein, at any time at whatever rates they desire.

(2) Releases of water from the accounts, including those established in Section III herein, may be made simultaneously with releases from conservation storage into the accounts. However, such simultaneous releases cannot create deficits in those accounts.

(3) All such releases of account water from John Martin Reservoir to Colorado water users are subject to transit losses between John Martin Dam and the point of diversion from the Arkansas River, as determined by the Colorado Division Engineer, and the transit losses shall be borne by such releases.

(4) Releases of Kansas account water shall be measured at the Stateline as provided in Compact Article V E (3) allowing appropriate arrival times. If transit losses occur, those losses shall be determined by the Colorado Division Engineer and a representative of the Kansas Division of Water Resources and shall be replenished from the Kansas transit loss account. In the event that such losses at the end of the delivery are greater than the total in the Kansas transit loss account, then the deficit shall be made up from the next available transfers of other water under Subsection III D.

(5) The water users and the responsible officials of both Colorado and Kansas shall do their utmost to achieve maximum beneficial use including calling for deliveries of Kansas

account water during reasonable and favorable river conditions. When transit losses are deemed by the Colorado Division Engineer to be excessive, he shall so advise the receiving entity. Conversely, when river conditions are favorable for a delivery to Kansas, he shall so advise the Kansas Water Commissioner.

F. Evaporation charges shall be made against water stored in the accounts, including those established in Section III, herein, and the Kansas transit loss account, using formulas and procedures approved by the Colorado Division Engineer and a representative of the Kansas Division of Water Resources and using, when available, pan evaporation data provided by the Corps of Engineers. The evaporation charges shall be prorated amongst conservation storage and the accounts according to the amounts in them.

G. In the event that runoff conditions occur in the Arkansas River basin upstream from John Martin Reservoir that cause water to spill physically over the project's spillway, then water stored in the permanent pool in excess of 10,000 a.f. shall spill before the accounts granted in Subsection III A, B, and C, which shall spill before the accounts granted in Section II, which shall spill before the Kansas Transit Loss Account, all of which shall spill before the conservation pool water. The amount of spill from the accounts shall be prorated amongst them according to the amounts in them at the beginning of spill. During times of spill, the permanent pool shall occupy flood control space as provided in the Administration's Resolution of August 14, 1976, and Public Law 89-298.

III. Other Water for Regulation by John Martin Reservoir:

A. The Amity may store such water as it could otherwise divert from the Arkansas River for storage in the Great Plains Reservoir system in its account granted in Section II, herein. This water will be in addition to water released into the Amity account under Section II, herein.

B. An account for the Fort Lyon Canal is hereby granted in John Martin Reservoir for agricultural purposes only. The Fort Lyon Canal may deliver water into said account under an approved Pueblo winter storage plan subject to the limitations that total quantity in the account at any time cannot exceed 20, 000 acre-feet and that the delivery cannot include water that otherwise would have accumulated in conservation storage. The Fort Lyon may use water in this account for exchange with existing priorities. However, this account shall not be used in any manner to increase the permanent recreation pool, either by exchange, transfer, change of use, or otherwise. In the event that water accumulated in this account has not been completely released by the end of the compact year, then that water shall become conservation storage controlled by Subsection II A, herein.

C. An account for the Las Animas Consolidated Canal Company is hereby granted in John Martin Reservoir for agricultural purposes only. The Las Animas Consolidated Canal Company may deliver water into said account under an approved Pueblo winter storage plan subject to the limitations that total quantity in the account at any time cannot exceed 5,000 acre-feet and

that the delivery cannot include water that otherwise would have accumulated in conservation storage. The Las Animas Consolidated may use water in this account for exchange with existing priorities. However, this account shall not be used in any manner to increase the permanent recreation pool, either by exchange, transfer, change of use, or otherwise. In the event that water accumulated in this account has not been completely released by the end of the compact year, then that water shall become conservation storage controlled by Subsection II A.

D. Thirty-five percent of all water deliveries to John Martin Reservoir, under Subsections III A, III B, and III C, herein, during any compact year shall be transferred into the accounts for Kansas transit losses, for Kansas, and for Colorado Water District 67 ditches at the time of delivery in the following manner: First, transfers from deliveries shall make up deficits, if any, in the Kansas transit loss account which result from Subsection II E (4), herein, and shall then also fill the said Kansas transit loss account to the amount of 1,700 acre-feet. Then, of all such water delivered in excess of this specified amount, 11 percent of those deliveries shall be transferred to the Kansas account and 24 percent of those deliveries shall be transferred to the account of the Colorado Water District 67 ditches. Transfers into the accounts for Colorado Water District 67 ditches shall be distributed according to the percentages in Subsection II D (3), herein; except the Amity shall not share in distributions of deliveries under Subsection III A, herein.

IV. A permanent recreation pool has been authorized by the August 14, 1976, Resolution of the Administration. For purposes of the Resolution, this permanent recreation pool shall be considered a separate account and deliveries made to it are not subject to the transfers provided in Subsection III D, herein. The permanent recreation pool will, however, stand its pro rata share of evaporation as provided in the Administration's Resolution of August 14, 1976.

V. In the event of injury either to entities in Colorado or to Kansas, there shall be restitution from the first account water thereafter available from the entity receiving improper benefits. The engineering committee shall quantify such injury, subject to the approval of the Administration

VI. Adoption of this resolution does not prejudice the ability of Kansas or of any Colorado ditch to object or to otherwise represent its interest in present or future cases or controversies before the Administration or in a court of competent jurisdiction.

VII. This agreement shall be, and continue to be, in full force and effect from and after the date of execution of this resolution until March 31, 1981, and year to year thereafter subject to the following provisions:

A. Not later than December 1 of each year, the Colorado Division Engineer shall make an accounting of the operation under this resolution for the previous compact year available to the Operations Committee of the Administration and to interested parties. Either Colorado or Kansas, through its compact delegation, may then terminate this resolution on the next succeeding March 31 by giving written notice to the Administration by February 1 of the same compact year.

B. In the event this resolution is so terminated, then entities storing water in accounts prior to such termination may utilize such water during the next irrigation season under the provisions of this resolution. Water not utilized by the following November 1 shall revert to conservation storage.

VIII. This resolution supersedes in its entirety the agreement of December 12, 1978, concerning Amity-Great Plains water and the Resolution concerning an Interim Operating Plan for John Martin Reservoir entered into on March 21, 1980. All water delivered into the accounts established under the authorities of these two resolutions shall be forwarded and credited, without deductions, to the accounts for the same entities that are established in this operating plan.

Entered this 24th day of April, 1980, by special telephonic meeting, and revisions approved on May 10, 1984 and December 11, 1984.

/s/ Frank G. Cooley
Chairman
Arkansas River
Compact
Administration

/s/ James G. Rogers
Secretary
Arkansas River
Compact
Administration

/s/ J. William McDonald
Colorado Member
Arkansas River
Compact
Administration

/s/ David L. Pope
Kansas Member
Arkansas River
Compact
Administration

APPENDIX – Exhibit 11

Kansas Exhibit 111*** "Effects of Post-Compact Pumping and the Winter Water Program on Stateline Flows"

PLAINTIFF'S EXHIBIT 111***

Case No. 105

EFFECTS OF POST-COMPACT PUMPING AND THE WINTER WATER PROGRAM ON STATELINE FLOWS

Revised 2/23/92

Institutional Conditions					Depletions of Stateline Flows 1950 - 1985 (thousand acre – feet)	Depletions Less Accretions of Stateline Flows 1950 - 1985 (thousand acre – feet)	Depletions of Usable Stateline Flows 1950 - 1985 (thousand acre – feet)
	Pumping	Winter Water	1980	Trans Mtn			
Combined Effects	H C	H C	C C	H O	650	608	489
Historical Pumping	H C	H H	H H	H H	852	825	620
Winter Water	H H	H C	C C	H H	53	17	40
Future Pumping	P C	C C	C C	O O	1150	1146	783

H = Historical Conditions
C = Compact Conditions
O = No transmountain deliveries
P = Projected (future) pumping

APPENDIX – Exhibit 12

Order to Correct Record re Defendant's Exhibits, filed January 5, 1994

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff,	)	
v.	)	No. 105 Original
STATE OF COLORADO, Defendant,	)	October Term, 1985
and	)	
UNITED STATES OF AMERICA, Defendant-Intervenor.	)	

ORDER TO CORRECT RECORD RE DEFENDANT'S EXHIBITS

(Filed Jan. 5, 1994)

The State of Colorado, the State of Kansas, and the United States have filed a Stipulation to Correct Record Re Defendant's Exhibits. Based on the Stipulation, which is hereby approved, the record of proceedings held before Special Master Arthur L. Littleworth is corrected as follows:

1. The record of proceedings for Monday, April 29, 1991, Volume LXXI (71) at page 4, line 19, is hereby corrected to refer to Defendant's Exhibit 88a, b, and c, not Defendant's Exhibit 168a, b, and c.

2. The record of proceedings for Monday, April 29, 1991, Volume LXXI (71) at page 23, lines 21-22, is hereby corrected to state that Defendant's Exhibit 88a, b, and c, not Defendant's Exhibit 168a, b, and c, was admitted. The

summary of the final status of the Colorado exhibits shall reflect that Defendant's Exhibit 88a, b, and c was admitted on April 29, 1991, and shall not include Defendant's Exhibit 168.

3. The record of proceedings for Wednesday, April 17, 1991, Volume LXIV (64) at page 66, line 23, is hereby corrected to refer to Defendant's Exhibit 679*, not Defendant's Exhibit 689*. The summary of the final status of the Colorado exhibits shall not include Defendant's Exhibit 689*.

DATE: Jan. 5, 1994.

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL.

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On January 5, 1994, I served the within **ORDER TO CORRECT RECORD RE DEFENDANT'S EXHIBITS** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

John B. Draper
Montgomery & Andrews
325 Paseo de Peralta
P.O. Box 2307
Santa Fe, New Mexico 87504-2307

David W. Robbins, Esq.
Hill & Robbins
100 Blake Street Building
1441 Eighteenth Street
Denver, Colorado 80202

Patricia Weiss, Esq.
U.S. Department of Justice
Land & Natural Resources Division
General Litigation Section
P.O. Box 663
Benjamin Franklin Station
Washington, D.C. 20044-0663

Andrew F. Walch, Esq.
James J. DuBois, Esq.
U.S. Department of Justice
General Litigation Section
999 18th Street, Suite 945
Denver, Colorado 80202

On January 5, 1994, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on January 5, 1994, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons

APPENDIX – Exhibit 13

Order Regarding Plaintiff's
Exhibits, filed March 11, 1994

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, vs. STATE OF COLORADO, Defendant, and UNITED STATES OF AMERICA, Defendant-Intervenor.	No. 105, Original October Term 1985

ORDER REGARDING PLAINTIFF'S EXHIBITS

(Filed Mar. 11, 1994)

The State of Kansas, the State of Colorado, and the United States, by their respective counsel, have filed a Stipulation Regarding Plaintiff's Exhibits. Based on the Stipulation, which is hereby approved, the following is hereby ordered:

1. In the record of proceedings held before Special Master Arthur L. Littleworth, Volume 41 (January 16, 1991), at page 6, line 10, is in error in listing Plaintiff's Exhibit 61* and should have listed Plaintiff's Exhibit 61. The exhibits listed on page 6 were subsequently admitted on page 17, at lines 7-10. Accordingly, Volume 41 of the record of proceedings is hereby corrected as stated above, with the effect that the record of proceedings shall reflect that Plaintiff's Exhibit 61 is admitted. The summaries of the final status of the Kansas Exhibits shall reflect that

Plaintiff's Exhibit 61 was admitted and that Plaintiff's Exhibit 61* was not admitted.

2. In the record of proceedings held before the Special Master, Volume 31 (November 27, 1990), at pages 43, 56, 57, 58, 61, 66, 72, 74, 75, 76, 77, 78, and 80, is in error with regard to references to Plaintiff's Exhibit 358, which references should be to Plaintiff's Exhibit 358*. Accordingly, Volume 31 of the record of proceedings is hereby corrected to show that Plaintiff's Exhibit 358* was referred to on the pages listed above and was admitted. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 358* was admitted and shall not include Plaintiff's Exhibit 358.

3. In the record of proceedings held before the Special Master, Volume 35 (December 17, 1990), at page 116 (line 11) and Volume 36 (December 18, 1990), at pages 5, 64 (line 12) and 124 (line 28), are in error with regard to references to Plaintiff's Exhibit 371, which references should be to Plaintiff's Exhibit 371*. Accordingly, Volumes 35 and 36 of the record of proceedings are hereby corrected to show that Plaintiff's Exhibit 371* was referred to and admitted on the pages and lines listed above. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 371* was admitted and that Plaintiff's Exhibit 371 was discussed but not admitted.

4. Plaintiff's Exhibit 389** is hereby admitted into evidence as conforming to the large version of the map entitled "Ditch Service Areas for 1990" testified to by Mr. Frost and discussed by counsel in the record of proceedings before the Special Master in Volume 27 (November

13, 1990) at pages 76-81. Plaintiff's Exhibit 389*, the hand-held version discussed in the same transcript at pages 78-81, shall remain lodged with the Court, but not admitted. Therefore, in the record of proceedings before the Special Master, Volume 27, at pages 19, 46, 76 and 82, shall be modified with regard to references to Plaintiff's Exhibit 389, which references shall be to Plaintiff's Exhibit 389**. The summaries of the final status of the Kansas exhibits shall reflect that Plaintiff's Exhibit 389** was admitted and shall reflect that Plaintiff's Exhibit 389* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 389.

5. In the record of proceedings held before the Special Master, Volume 27 (November 13, 1990), at pages 19 and 46, is in error with regard to references to Plaintiff's Exhibit 394, which references should be to Plaintiff's Exhibit 394*. Accordingly, Volume 27, at pages 19 and 46, is hereby corrected to refer to Plaintiff's Exhibit 394*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 394* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 394.

6. In the record of proceedings held before the Special Master, Volume 27 (November 13, 1990), at pages 19 and 46, is in error with regard to references to Plaintiff's Exhibit 395, which references should be to Plaintiff's Exhibit 395*. Accordingly, Volume 27, at pages 19 and 46, is hereby corrected to refer to Plaintiff's Exhibit 395*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 395* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 395.

7. In the record of proceedings held before the Special Master, Volume 27 (November 13, 1990), at pages 19 and 46, is in error with regard to references to Plaintiff's Exhibit 397, which references should be to Plaintiff's Exhibit 397*. Accordingly, Volume 27, at pages 19 and 46, is hereby corrected to refer to Plaintiff's Exhibit 397*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 397* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 397.

8. In the record of proceedings held before the Special Master, Volume 27 (November 13, 1990), at pages 19 and 46, is in error with regard to references to Plaintiff's Exhibit 398, which references should be to Plaintiff's Exhibit 398*. Accordingly, Volume 27, at pages 19 and 46, is hereby corrected to refer to Plaintiff's Exhibit 398*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 398* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 398.

9. In the record of proceedings held before the Special Master, Volume 27 (November 13, 1990), at pages 19 and 46, is in error with regard to references to Plaintiff's Exhibit 399, which references should be to Plaintiff's Exhibit 399*. Accordingly, Volume 27, at pages 19 and 46, is hereby corrected to refer to Plaintiff's Exhibit 399*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 399* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 399.

10. In the record of proceedings held before the Special Master, Volume 27 (November 13, 1990), at pages 19 and 46, is in error with regard to references to Plaintiff's Exhibit 400, which references should be to Plaintiff's Exhibit 400*. Accordingly, Volume 27, at pages 19 and 46, is hereby corrected to refer to Plaintiff's Exhibit 400*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 400* was the subject of testimony, but not admitted, and shall not include Plaintiff's Exhibit 400.

11. In the record of proceedings held before the Special Master, in Volumes 27 and 28 (November 13 and 14, 1990, respectively), all pages that refer to, and page 95 of Volume 27 that admitted, Plaintiff's Exhibit 401 are in error and should have referred to and admitted Plaintiff's Exhibit 401*. Accordingly, Volumes 27 and 28 of the record of proceedings are hereby corrected to refer to Plaintiff's Exhibit 401*. The summaries of the final status of the Kansas exhibits shall reflect that Plaintiff's Exhibit 401* was admitted and shall not include Plaintiff's Exhibit 401.

12. In the record of proceedings held before the Special Master, in Volume 27 (November 13, 1990), all pages that refer to, and page 102 that admitted, Plaintiff's Exhibit 402 are in error and should have referred to and admitted Plaintiff's Exhibit 402*. Accordingly, Volume 27 of the record of proceedings is hereby corrected to refer to Plaintiff's Exhibit 402*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 402* was admitted and shall not include Plaintiff's Exhibit 402.

13. In the record of proceedings held before the Special Master, in Volume 27 (November 13, 1990), all pages that refer to, and page 133 that admitted, Plaintiff's Exhibit 403 are in error and should have referred to and admitted Plaintiff's Exhibit 403*. Accordingly, Volume 27 of the record of proceedings is hereby corrected to refer to Plaintiff's Exhibit 403*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 403* was admitted and shall not include Plaintiff's Exhibit 403.

14. In the record of proceedings held before the Special Master, in Volume 27 (November 13, 1990), all pages that refer to, and page 137 that admitted, Plaintiff's Exhibit 404 are in error and should have referred to and admitted Plaintiff's Exhibit 404*. Accordingly, Volume 27 of the record of proceedings is hereby corrected to refer to Plaintiff's Exhibit 404*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 404* was admitted and shall not include Plaintiff's Exhibit 404.

15. In the record of proceedings held before the Special Master, in Volume 27 (November 13, 1990), all pages that refer to, and page 140 that admitted, Plaintiff's Exhibit 406 are in error and should have referred to and admitted Plaintiff's Exhibit 406*. Accordingly, Volume 27 of the record of proceedings is hereby corrected to refer to Plaintiff's Exhibit 406*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 406* was admitted and shall not include Plaintiff's Exhibit 406.

16. In the record of proceedings held before the Special Master, in Volumes 27, 28 and 29 (November 13, 14 and 15, 1990, respectively), all pages that refer to, and page 56 of Volume 27 that admitted, Plaintiff's Exhibit 471 are in error and should have referred to and admitted Plaintiff's Exhibit 471*. Accordingly, Volumes 27, 28 and 29 of the record of proceedings are hereby corrected to refer to Plaintiff's Exhibit 471*. The summaries of the final status of the Kansas Exhibits shall reflect that Plaintiff's Exhibit 471* was admitted and shall not include Plaintiff's Exhibit 471.

DATED: March 11, 1994.

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On March 11, 1994, I served the within **ORDER REGARDING PLAINTIFF'S EXHIBITS** by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

John B. Draper
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James J. DuBois, Esq.
U.S. Department of Justice
General Litigation Section
999 18th Street, Suite 945
Denver, Colorado 80202

On March 11, 1994, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on March 11, 1994, at Riverside, California.

/s/ Sandra L. Simmons
Sandra L. Simmons